IN THE

Supreme Court of the United States

OCTOBER TERM—1950

No. 170

THE UNITED STATES,

Petitioner,

—v.—

PENNER INSTALLATION CORPORATION.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Petition of the Government proceeds upon the erroneous premise that gross mistake and bad faith were not presented by the pleadings, nor was the case tried upon that premise (Petition, page 8).

The Claim of Respondent as filed in the Court of Claims specifically alleged in paragraph 6 (R. 1 & 2), "That the defendant breached and violated the terms of the contract, in that it *arbitrarily, unlawfully* • • •; *arbitrarily* and *unreasonably* classified various items of work *erroneously* and *failed* and *refused* to pay • • •; *deliberately* withheld payments • • •; *deliberately underpaid claimant* and *underestimated the amount and value* of the labor performed and materials furnished • • •. (Italics ours.)

The case was tried on this theory, the correspondence from Claimant to the Government and all the appeals to the Head of the Department were on this theory.

It was only because of the arbitrary, unreasonable, unlawful acts, bad faith and gross error on the part of the Government, that respondent was granted a judgment.

The Court of Claims made a specific finding to that effect, stating (R. 31):

> "22. The decisions of the contracting officer and the head of the department on plaintiff's claim were arbitrary and so grossly erroneous as to imply bad faith."

The Supreme Court has consistently held that the findings of the Court of Claims are binding, final and conclusive on the Supreme Court.

In *U. S.* v. *Esnault-Pelterie*, 303 U. S. 26, after discussing general method of appeal and the fact that findings are conclusive, stated at page 29 and 30:

> "* * * the findings of the Court of Claims 'are to be treated like the verdict of a jury, and we are not at liberty to refer to the evidence, any more than to the opinion, for the purpose of eking out, controlling, or modifying their scope.' *Brothers* v. *U. S.*, 250 U. S. 88, 93; *Stilz* v. *U. S.*, 269 U. S. 144, 147, 148; *U. S.* v. *Esnault Pelterie, supra* (299 U. S. 20). The requirement that the Court of Claims should find the ultimate facts which are controlling, places upon the Court the duty of resolving conflicting inferences and to draw from the evidence the necessary conclusions of fact. *U. S.* v. *Adams*, 6 Wall 101, 102. Even though the finding determines a mixed question of law and fact, the finding is conclusive unless the court is able 'to so separate the question as to see clearly what and

where the mistake of law is.' *Ross* v. *Day*, 232 U. S. 110, 117; *U. S.* v. *Omaha Indians*, 253 U. S. 275, 281; *Stilz* v. *U. S., supra; U. S.* v. *Swift & Co.*, 270 U. S. 124, 138."

and at page 31,

"We must take the findings of fact as made below."

So, too, in *U. S.* v. *Causby*, 328 U. S. 256, at 268:

"We do not stop to examine the evidence to determine whether it would support such a finding, if made. For that is not our function. *U. S.* v. *Esnault Pelterie, supra* (303 U. S. 26) p. 206."

In the case of *Luckenback S. S. Co.* v. *U. S.*, 272 U. S. 533 this court stated at 538-539:

"This Court uniformly has regarded the legislation and rules as confining the review to questions of law shown by the record when made up as the rules direct. Bills of exception are not recognized in either the legislation or the rules; nor is there other provision for bringing the evidence into the record or including therein the various rulings involved in applying to the evidence presented the rules which mark the line between what properly may be considered and what must be rejected. As long ago as *Mahon* v. *U. S.*, 14 Wall 109, 111, this Court said of the rules that they could not be examined 'without seeing that the purpose was to bring nothing here for review but questions of law, leaving the Court of Claims to exercise the functions of a jury in finding facts, equivalent to a special verdict and with like effect.' "

So, too, in *Chesapeake & Potomac Telephone Co.* v. *U. S.*, 281 U. S. 385 at 388:

> "It seems to us that the dissent of two of the Judges of the Court below is directed rather to the findings than to the statement of the law upon the findings as they stand. These are not open to question before us."

In the instant case the contract specifically limits decisions of the Contracting Officer and Head of the Department to questions of fact (Contract, Article 15; R. 10). It is different from the *Morman* case in that important respect.

In the *Morman* case, no finding was made to the effect that the decision of the Contracting Officer and Head of the Department were arbitrary and so grossly erroneous as to imply bad faith. As stated by this Court in the *Morman case*:

> "Findings of such a contractually designated agent, even where employed by one of the parties, were held 'conclusive, *unless impeached on the ground of fraud, or gross mistake as necessarily implied bad faith.*'
>
> "The holdings of the foregoing cases have never been departed from by this Court." (Italics ours.)

This Court therefore recognized the fact that even with the broad clause in the *Morman* case, a finding that the actions of the Contracting Officer and Head of the Department were arbitrary and so grossly erroneous as to imply bad faith, would have entitled the claimant to relief. This is the express finding of the Court of Claims in the instant matter.

One need only to look at the testimony in this case to be convinced of the absolute arbitrariness, unreasonableness and gross erroneousness and the patent bad faith of the defendant's representatives.

The conclusive fact of defendant's bad faith is the fact that although the airport was delivered complete, even by defendant's own arbitrary requirements on April 7, 1945, the Government took until December, 1945 before it made payment to the Contractor. The Contractor contended that its job was completed in November, 1944. No excuse was offered by the Government's witnesses for this delay, except the fact that they were annoyed that claimant had the temerity to question their acts.

So too, we find throughout the entire record absolutely no evidence ever being offered by the defendant as to any quantities or value of items claimed by the plaintiff. Defendant did not even take the trouble to check plaintiff's claims or plaintiff's amounts, and at no time questioned the fairness or reasonableness of these amounts.

With regard to other items allowed by the Court, the opinion of the Court bears out the unreasonableness and bad faith. In the matter of the poles, the Court points out the fact that the testimony is uncontroverted that the defendant represented and warranted to the plaintiff that no poles would be required, and induced the plaintiff, for defendant's own record purposes, to put in a nominal unit price for the poles, and then added poles to the contract and required plaintiff to furnish the poles at these fraudulently induced prices (R. 30).

We do not wish to burden the Court with a recitation of all the testimony, but it is a fair statement to make that all the other items which plaintiff claimed were handled by the defendant in the same manner.

The Court of Claims has expressly made the finding of arbitrariness, gross error and bad faith, which was lacking in the *Morman* case. This finding being final and conclusive on this Court, it is respectfully submitted that there is no basis, warrant or justification for any review, as no novel question is being raised and the petition should be denied.

Respectfully submitted.

ALBERT FOREMAN
Attorney for Respondent

M. CARL LEVINE, MORGULAS & FOREMAN
On the Brief

arbitrarily, capriciously or decisions so gross erroneous as to show bad faith

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Contract provision involved	2
Statement	3
Specification of errors to be urged	8
Summary of argument	9
Argument	12
I. The ruling of the designated officer may be set aside only for fraud or such gross mistake as would necessarily imply bad faith	16
A. The employment of the arbiter by one of the parties to the controversy is not a proper element to be considered in impeaching the correctness of his ruling	18
B. The fact that the finding of the designated officer is incorrect does not, without more, invalidate his ruling	21
II. The Court of Claims' conclusion of bad faith on the part of the Government arbiters cannot stand since that court made no findings as to what evidence was before the officials at the time of the administrative determination	24
III. The findings of the court fail to establish error so gross as necessarily to imply bad faith in respect of the claims which that court allowed	26
A. There was no bad faith with respect to the rulings on three items specifically held to be grossly erroneous	27
B. The court below erred in attributing the bad faith it inferred from the administrative rulings on the preceding three items to the rulings on five other items	32
Conclusion	33

CITATIONS

Cases:	
Bein v. *United States*, 101 C. Cls. 144	20
Beuttas v. *United States*, 101 C. Cls. 748, reversed, 324 U. S. 768	12
Blair v. *United States*, 99 C. Cls. 71, reversed, 321 U. S. 730	12

Cases—Continued — Page

Breyman v. *Ann Arbor R. Co.*, 85 Fed. 579 — 24
Brooks-Callaway Co. v. *United States*, 97 C. Cls. 689, reversed, 318 U. S. 120 — 12
Burchell v. *Marsh*, 17 How. 344 — 19, 22, 23, 26
Callahan Walker v. *United States*, 95 C. Cls. 314, reversed, 317 U. S. 56 — 12
Chicago and Santa Fe R. R. Co. v. *Price*, 138 U. S. 185 — 17, 19, 22
Choctaw & M. R. R. Co. v. *Newton*, 140 Fed. 225, certiorari denied, 202 U. S. 620 — 23, 28
City of Lexington v. *Pratt*, 31 F. 2d 820 — 24
Elliott v. *Missouri, K. & T. R. R. Co.*, 74 Fed. 707 — 20, 27
Goltra v. *Weeks*, 271 U. S. 536 — 19
Holpuch v. *United States*, 104 C. Cls. 254, reversed, 328 U. S. 234 — 13
Kihlberg v. *United States*, 97 U. S. 398 — 12, 16, 19, 27
Knox v. *Symmonds*, 1 Ves. Ch. Rep. 369 — 19, 23
Martinsburg & Potomac R. Co. v. *March*, 114 U. S. 549 — 13, 17, 19, 22, 24
McShain v. *United States*, 88 C. Cls. 284, reversed, *per curiam*, 308 U. S. 512 — 12
Merrill-Ruckgaber Co. v. *United States*, 241 U. S. 387 — 19, 24
Moorman v. *United States*, 113 C. Cls. 159, reversed, 338 U. S. 457 — 13
Mundy v. *Louisville & N. R. Co.*, 67 Fed. 633 — 19
National Labor Relations Board v. *Pittsburgh Steamship Co.*, 337 U. S. 656 — 33
Ogden v. *United States*, 60 Fed. 725 — 20, 22
Plumley v. *United States*, 226 U. S. 545 — 19
Ranger v. *Great Western Railway Co.*, 5 H.L. Cas. 72 — 20
Ripley v. *United States*, 220 U. S. 491 — 25
Ripley v. *United States*, 222 U. S. 144 — 17, 26
Ripley v. *United States*, 223 U. S. 695 — 17, 22
Sweeney v. *United States*, 109 U. S. 618 — 12, 17, 19
United States v. *Blair*, 321 U. S. 730 — 17, 21
United States v. *Callahan-Walker Co.*, 317 U. S. 56 — 32
United States v. *Causby*, 328 U. S. 256 — 32
United States v. *Esnault-Pelterie*, 299 U. S. 201; 303 U. S. 26 — 12, 31, 32
United States v. *Gleason*, 175 U. S. 588 — 17, 19, 20, 24
United States v. *Holpuch*, 328 U. S. 234 — 21
United States v. *McShain, Inc.*, 308 U. S. 512 — 19
United States v. *Mason & Hanger Co.*, 260 U. S. 323 — 19, 24
United States v. *Moorman*, 338 U. S. 457 — 7, 9, 13, 14, 16, 19, 23

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 170

THE UNITED STATES, PETITIONER

v.

PENNER INSTALLATION CORPORATION

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The original opinion of the Court of Claims (R. 23–25) is reported at 114 C. Cls. 571. The supplemental opinion of the Court of Claims (R. 26–31) is reported at 89 F. Supp. 545.

JURISDICTION

The original judgment of the Court of Claims was entered on October 3, 1949 (R. 26). The Government's motion for a new trial, seasonably filed, was overruled on November 7, 1949 (R. 26). The Government's motion for leave to file a second motion for new trial was allowed on December 19, 1949 (R. 26). On April 3, 1950,

the Court of Claims granted the Government's motion for a new trial, withdrew its judgment of October 3, 1949, and entered a new judgment (R. 31). The petition for a writ of certiorari was filed on June 30, 1950, and was granted on October 9, 1950. The jurisdiction of this Court rests upon 28 U. S. C. 1255.

QUESTION PRESENTED

Whether the decision of a designated agent of the Government on disputes arising out of a contract, which decision the contract provides "shall be final and conclusive upon the parties thereto," may be set aside as "arbitrary, capricious or so grossly erroneous as necessarily to imply bad faith" on the basis of (1) a presumption created by the court below that the decision lacked impartiality because the designated agent was an employee of one of the parties to the contract, and (2) the finding, predicated solely on the evidence before the court without reference to the evidence before the designated agent when he made his decision, that the decision was erroneous.

CONTRACT PROVISION INVOLVED

Article 15 of the contract provides (R. 10):

> *Disputes.*—Except as otherwise specifically provided in this contract, all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the

head of the department concerned or his duly authorized representative, whose decisions shall be final and conclusive upon the parties thereto. In the meantime the contractor shall diligently proceed with the work as directed.

STATEMENT

On September 28, 1944, Penner Installation Corporation, respondent herein, entered into a unit-price contract (R. 4–14) with the United States through the Civil Aeronautics Administration for furnishing certain materials and performing certain installation work for an airport lighting system at Port Erie Airport, Erie, Pennsylvania. Article 15 of the contract (*supra*, pp. 2–3), a standard provision for the administrative determination of disputes, provided that "all disputes concerning questions of fact arising under this contract shall be decided by the contracting officer subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decisions shall be final and conclusive upon the parties thereto." After unsuccessfully invoking the machinery which the contract prescribed for the final settlement of disputes, respondent instituted this proceeding in the Court of Claims seeking to recover $20,139.59 on a number of claims arising under the contract. In its complaint (R. 1–3), Penner alleged that defendant's

[the United States'] measurements of the work done at unit prices were incorrect in a number of instances, that in other instances the unit price fixed for the work done was too low, that in still other instances the price paid for extra work ordered was too low. Penner further alleged that the claims asserted had been presented to the contracting officer and duly appealed to the Secretary of Commerce, but "that the defendant has failed and refused to pay said claims" (R. 3). There was no allegation, however, that the actions of the contracting officer and the Secretary of Commerce, in rejecting the claims, were arbitrary, capricious or so grossly erroneous as to imply bad faith.[1]

In its special findings, the Court of Claims found, *inter alia,* that pursuant to Article 15 of the contract (*supra,* pp. 2–3), respondent submitted to the contracting officer an itemized statement of the amount claimed to be due (R. 16). The contracting officer granted an allowance on a few of the claims and rejected the remainder which included the items of claim involved in this suit (R. 16). On appeal by the respondent, the Secretary of Commerce sustained the decision of the contracting officer (R. 16). The court made no finding, however, as to whether the actions of the contracting officer and the head of the department were arbitrary or so grossly erroneous as necessarily to imply bad faith nor did it make

[1] See *infra*, note 9, p. 24.

any subsidiary finding as to what evidence was before these officers at the time they acted. Instead, the court below made findings on the merits of the claims. In its opinion, the court stated (R. 24):

> We find it unnecessary to comment on each and every item. Suffice it to say that we have carefully reviewed the commissioner's report and the exceptions thereto taken by both the plaintiff and the defendant, and, except in the instances noted below, we are of the opinion that the weight of the evidence is not against the commissioner's findings, and we have, accordingly, adopted his findings, with only minor exceptions.

The court agreed with the administrative disposition of most of the claims, and refused to allow recovery thereon (R. 24–25). On ten claims, however, the court found that it disagreed with the administrative disposition thereof.[2] On the basis of this disagreement, the court initially held that the sum of $3,810.42 was due respond-

[2] The substance of the court's findings on the eight claims on which it ultimately awarded damages to respondent follows:

(1) On the 6″ x 18″ trench, the court found that the evidence before it established that respondent had excavated a total of 27,296 lineal feet, that respondent had been paid for only 23,855 lineal feet, an underpayment of 3,441 lineal feet, and that $447.33 was due respondent (R. 17, 25).

(2) On cable trench in excess of 6″ x 18″, the court found on the evidence before it that respondent exca-

ent (R. 25) and entered judgment for that amount (R. 26).

The Government's motion for a new trial called the court's attention to the fact that its allowance of recovery conflicted with the provisions of Article 15 since there was no finding that the decision of the head of the department on these claims was arbitrary, capricious or so grossly er-

---

vated 629 cubic yards, which is 426 cubic yards more than the 203 for which respondent was paid. $2,130.00 was held to be due respondent. (R. 17, 25.)

(3) On cable in trench, the court found that on the evidence before it 35,071 feet was actually placed. Since respondent was paid for only 34,395 feet, the court held that respondent was entitled to payment for 676 feet and awarded $13.52. (R. 18, 25.)

(4) The court awarded respondent $16.00 for one of the cable splices for which respondent had not been paid. The other five cable splices were, the court found, caused by respondent's own fault. (R. 18, 25.)

(5) On driving conduit under road, the court found that respondent had submitted a price of $32.00 per lineal foot, but later formally agreed to do the work for $6.00 a foot. Although the respondent was claiming $35.80 a foot and the CAB had fixed a price of $4.00 a foot, the court held that $8.00 was a fair and reasonable price and awarded $400.00. (R. 18–19, 25.)

(6) On furnishing and installing wood poles, the court found that respondent originally bid $70.00 a pole, but reduced it to $35.00 a pole at the Government's request when told that no poles would be required. Subsequently, respondent was directed to furnish 12 poles varying in length between 18 and 30 feet. The court further found that under the winter conditions under which the work was done, a fair price was $70.00 a pole and awarded $420.00. (R. 19, 25.)

(7) On the 1¼" conduit, the court found that respondent installed 150 feet of 1¼" conduit but was paid

roneous as necessarily to imply bad faith. That motion was overruled on November 7, 1949 (R. 26). Subsequently on December 19, 1949, the court below granted the motion of the United States for leave to file a second motion for new trial, in which it was urged that this Court's disposition of *United States* v. *Moorman*, Oct. Term, 1949, No. 97, which was then pending on writ of certiorari would control here (R. 26).

After this Court's decision in the *Moorman* case, 338 U. S. 457, the court below, on April 3, 1950, withdrew its original judgment and granted the Government's motion for a new trial (R. 31). In its supplemental opinion simultaneously entered, the court stated that "In considering whether or not the contracting officer has acted impartially it is, of course, proper to take into consideration in any case, whether or not actual bias is shown, the correctness of his findings, his relationship to the parties, the allegiance he avows, and the duties his employment by one of them casts upon him" (R. 28–29). The court concluded that a

for 1" conduit, in accordance with the contract, and awarded $7.15. The court further found that a total of 490 feet was installed but respondent was paid for 469 feet. The court awarded $13.76 for the additional 21 feet. (R. 20–21, 25.)

(8) On supporting steel bands, the court found on the evidence before it that respondent procured and installed 12, rather than the six bands for which it had been paid, and awarded $18.00 for the unpaid six bands (R. 21, 25).

914709—50——2

consideration of these factors compelled a finding of bad faith in this case, and thus ended its opinion by amending its findings to add a new finding (R. 31):

> 22. The decisions of the contracting officer and the head of the department on plaintiff's claim were arbitrary and so grossly erroneous as to imply bad faith.

The court then reaffirmed its original judgment, except with regard to two claims involving extras not ordered in writing, thus allowing respondent to recover $3,465.76, instead of $3,810.42 (R. 31).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In holding that arbitrariness and bad faith could be imputed to the decisions of the government arbiters because of error in the decision and because of the fact that they were agents of the Government.

2. In holding that the decisions of the government officers were arbitrary and so grossly erroneous as to imply bad faith, in the absence of circumstantial findings sufficient to warrant such conclusion.

3. In failing to find what evidence was before the government arbiters at the time they acted on respondent's claim.

4. In concluding that the decisions of the government officers were so grossly erroneous as to imply bad faith, although bad faith of the officers was not alleged.

5. In assuming that the decisions of the contracting officer, rather than that of the Secretary of Commerce, were final.

6. In holding on the basis of its findings that fraud or such gross error as to necessarily imply bad faith on the part of the government officers had been established.

7. In entering judgment for respondent in the sum of $3,465.76.

SUMMARY OF ARGUMENT

Construction contracts entered into between the United States and a contractor usually contain, as here, a provision that disputes arising under the contract shall be settled by a designated officer or agent of the Government. It is well settled that the decisions of that officer or agent are binding and conclusive upon the parties to the contract, and may be set aside by the courts only for the most grave reasons, only "on the ground of fraud, or such gross mistake as necessarily implied bad faith." *United States* v. *Moorman*, 338 U. S. 457, 461. In setting aside the decisions of the arbiter designated by the contract here, the Court of Claims made no finding of actual fraud or bias. Rather, it imputed bad faith to the contracting officer on the basis of (1) his relationship to the parties, the allegiance he owes the Government, his duties of employment, and (2) the alleged errors in his findings. Such a formula disregards the specific terms of the contract and the consistent decisions of this Court.

I

A. It is well established that the fact that the arbiter is an employee of one of the parties to the contract does not entitle his decisions to any less finality than the decisions of designated agents not so employed. It was not competent, therefore, for the court below to consider the fact that the contracting officer was an agent of the Government and owed allegiance to the Government. To consider the relationship between the arbiter and the Government can only result in creating a presumption that the arbiter acts in bad faith. But the presumption established by the decisions is that the designated agent acts in good faith. And this is especially true when he is a Government official and has no personal financial interest in the matter.

The court below erred, moreover, in assuming that the decision of the contracting officer controlled. The contract clearly provided that the decision of the head of the department was to be final. In contrast to the contracting officer, the head of the department is not immediately concerned with the day-by-day performance of the contract and is in a position to take a more objective view of the merits of the dispute.

B. The presence *vel non* of mere error in the arbiter's decision is irrelevant in determining whether to accord it finality. It was plainly contemplated by the parties that the designated

agent would make erroneous rulings but that mere error would not be sufficient to set aside the decision. As this Court has long recognized, there would be little purpose in including the finality provision in the contract were the arbiter's decision to be final only if correct. Under the decisions of this Court, the error must be so gross as necessarily to imply bad faith. As will appear, that is not the case here.

II

The court below made no findings whatsoever as to the evidence before the contracting officer or the department head. But, plainly, bad faith cannot be imputed to those officers without an appraisal of the evidence and facts upon which they acted.

III

A. Passing the failure of the court below to determine what evidence was before the contract arbiters, the facts stated in the opinion of the Court of Claims do not, in any event, establish mistakes so gross as to require an inference of bad faith on their part. Moreover, the court's conclusion that the administrative awards with respect to three items were grossly erroneous is not supported by evidentiary findings. The failure of the court below to "include circumstantial facts sufficient to warrant the court's conclusion in respect of the main issues"

(*United States* v. *Esnault-Pelterie*, 299 U. S. 201, 205–206) constitutes reversible error.

B. The administrative disposition of the remaining five claims was not even deemed by the court below to be grossly erroneous; the rulings on those items were set aside solely as a consequence of the wholly unwarranted attribution by the court below to the rulings on these items of the bad faith found with respect to the other three.

ARGUMENT

It is, and at least since *Kihlberg* v. *United States*, 97 U. S. 398, and *Sweeney* v. *United States*, 109 U. S. 618, has been, settled law that where the United States and a contractor agree that certain decisions shall be made or disputes settled by a designated officer or agent of the Government, the decision of that officer or agent is binding and conclusive upon the parties to the contract. The decisions so made may not be reviewed judicially for the purpose of correcting any errors therein[3] and may be set aside only "on the ground of fraud, or such gross mistake

[3] In recent years, the Court of Claims has evidenced an inhospitable attitude toward this doctrine and has endeavored to qualify it so as sharply to circumscribe the finality of the decisions of the designated officer. See, *e. g.*, *McShain* v. *United States*, 88 C. Cls. 284, reversed *per curiam*, 308 U. S. 512, 520; *Callahan Walker* v. *United States*, 95 C. Cls. 314, reversed, 317 U. S. 56; *Brooks-Calloway Co.* v. *United States*, 97 C. Cls. 689, reversed, 318 U. S. 120; *Blair* v. *United States*, 99 C. Cls. 71, reversed, 321 U. S. 730; *Beuttas* v. *United States*,

as necessarily implied bad faith." *Martinsburg & Potomac R. Co.* v. *March,* 114 U. S. 549, 555. As recently as last term, this Court, in *United States* v. *Moorman,* 338 U. S. 457, 462, reasserted the binding effect of such an agreement and, while holding that the intention to make such an agreement "should be made manifest by plain language," observed that that did "not mean that hostility to such provisions can justify blindness to the plain intent of parties to adopt this method for settlement of their disputes." It cautioned that an agreement between contracting parties "to submit their contractual disputes to final determination outside the courts" should not "be frustrated by judicial 'interpretation' of contracts. If parties competent to decide for themselves are to be deprived of the privilege of making such anticipatory provisions for settlement of disputes, this deprivation should come from the legislative branch of government" (*ibid.*).

Before the decision of this Court in the *Moorman* case, the instant case had been decided by the Court of Claims adversely to the Government and a motion for a new trial had been overruled. In the original opinion (R. 23–25), there is no discussion whatsoever of the decisions of this

101 C. Cls. 748, reversed, 324 U. S. 768; *Halpuch* v. *United States*, 104 C. Cls. 254, reversed, 328 U. S. 234; *Moorman* v. *United States*, 113 C. Cls. 159, reversed, 338 U. S. 457.

Court requiring that finality be accorded to the decision of the contracting officer, and, when those decisions were specifically urged upon the court below in the motion for a new trial, that motion was overruled without comment (R. 26). Admittedly, this case involves disputes as to matters of fact only (R. 26) and had the Government sought, and this Court granted, certiorari in that posture of the case, the judgment below would undoubtedly have been reversed on the basis of the long line of decisions making the determination of the designated governmental official final and binding. While the *Moorman* case was pending before this Court, however, the Government filed a motion for leave to file a second motion for a new trial in which it was pointed out that a decision favorable to the Government in the *Moorman* case would *a fortiori* require a reversal of the judgment here. Leave was granted to file that motion and a motion for a new trial was duly filed (R. 26).

Following the decision of this Court in the *Moorman* case, the court below, on April 3, 1950, granted the Government's second motion for a new trial, entered a new opinion and judgment, and added one finding of fact (R. 31), namely that "The decisions of the contracting officer and the head of the department on plaintiff's claim were arbitrary and so grossly erroneous as to imply bad faith." The court below made no other

findings nor did it modify any of the findings that it had theretofore made in any way. With the exception of two minor items of claim, disallowed on the ground that the additional work was not ordered in writing (R. 29, 31), the court below reaffirmed its prior holding on the ground that the decision of the designated officers must be disregarded as they were arbitrary and so grossly erroneous as to imply bad faith.

The opinion below explains the reasoning by which the court reached this conclusion. It held that "the contracting officer must act impartially in settling disputes" (R. 27); that government contracting officers are almost always faithful to the Government but "frequently they are lacking in impartiality" (R. 28); that they "are the Government's representatives, charged with the duty of seeing that the Government gets what it bargained for" (R. 28), and that "the officer's fidelity to his employer * * * makes it * * * difficult for him to act impartially" (R. 28). The court then proceeded to lay down what it considered to be the appropriate standard. It stated: "In considering whether or not the contracting officer has acted impartially it is, of course, proper to take into consideration in any case, whether or not actual bias is shown, the correctness of his findings, his relationship to the parties, the allegiance he avows, and the duties his employment by one of them casts upon him"

(R. 28–29). Applying the doctrine which it had just enunciated to the facts which it had found in the instant case, the court below held that, because it found what it conceived to be serious error in the decisions of the contracting officer, the actions of that officer were "arbitrary and capricious, and lacking in that good faith required of an unbiased, impartial arbiter" (R. 30).

We submit that this new standard set up by the court below to determine whether the action of the contracting officer is so arbitrary and capricious or grossly erroneous as necessarily to imply bad faith, finds no support in the decisions of this Court which have laid down a much narrower rule, and, further, that the court below has failed to make necessary evidentiary findings to support its ultimate finding of arbitrariness and bad faith.

I

THE RULING OF THE DESIGNATED OFFICER MAY BE SET ASIDE ONLY FOR FRAUD OR SUCH GROSS MISTAKE AS WOULD NECESSARILY IMPLY BAD FAITH.

The decisions of this Court have repeatedly set forth the sole ground on which a ruling or determination made by a designated officer may be set aside. With slight variations of language, that ground is stated to be "fraud, or such gross mistake as *necessarily* implied bad faith." [Italics supplied.] *United States* v. *Moorman*, 338 U. S. 457, 461; *Kihlberg* v. *United States*,

97 U. S. 398, 402; *Sweeney* v. *United States,* 109 U. S. 618, 620; *Martinsburg & Potomac R. Co.* v. *March,* 114 U. S. 549, 555; *United States* v. *Gleason,* 175 U. S. 588, 602; cf. *Chicago and Santa Fe RR Co.* v. *Price,* 138 U. S. 185, 195; *Ripley* v. *United States,* 223 U. S. 695, 701.

In so far as the instant case is concerned, we can put to one side actual fraud or its equivalents, "bias," "lack of an honest judgment," or "bad faith," established as a result of direct proof.[4] The court below made no finding whatsoever that there was actual fraud or bias in the instant case. It did make a finding that the decisions of the contracting officer and the head of the department were arbitrary (R. 31). In its second opinion it held that the contracting officer "did not act as an impartial, unbiased arbiter, and that his decision, therefore, must be held to have been arbitary and capricious, and lacking in that good faith required of an unbiased, impartial arbiter" (R. 30). But there is no intimation in either the findings or the opinion that the court's holding that the contracting officer acted arbitrarily and in bad faith stemmed from anything

[4] Compare, *e. g., Ripley* v. *United States,* 222 U. S. 144, 147, where this Court remanded the case to the Court of Claims for an unequivocal finding of good or bad faith rather than gross mistake; *United States* v. *Blair,* 321 U. S. 730, 736, where the Court of Claims had found that the acts of the government agents at the site of the work were so unreasonable that the contractor could not take the administrative appeals without subjecting itself to reprisals.

other than the fact that the contracting officer was a government employee and that his decision was, in the opinion of the court below, clearly wrong in several factual aspects. To the contrary, its opinion is replete with disclaimers of an intent to attribute actual fraud or bias to government officials charged by contract with this important function.

The remaining elements thus left available to the court below under its formulated doctrine for determining impartiality and good faith of the arbiter fall into two groups: (1) The officer's relationship to the parties, the allegiance he avows and the duties his employment by one of them casts upon him, and (2) the correctness of his findings. We submit that this formula, which, in the final analysis, depends upon whether the court below finds error in the decision of the arbiters, so far fails to measure up to the standards set forth by this Court that it should be specifically disapproved.

A. THE EMPLOYMENT OF THE ARBITER BY ONE OF THE PARTIES TO THE CONTROVERSY IS NOT A PROPER ELEMENT TO BE CONSIDERED IN IMPEACHING THE CORRECTNESS OF HIS RULING

To give consideration and weight to the nature and type of employment of the arbiter under government contracts where the question of bad faith is involved, would effectively destroy the intended efficacy of the finality provisions of such contracts. Since the arbiters designated in stand-

ard government contracts are always employed by the Government, always owe allegiance to the Government, and the duties of their employment always require them to protect the interests of the Government, the decision below plainly creates a presumption of bad faith rebuttable only by a showing that the arbiter is guilty of serious error in no respect. But it has long been established that the fact that the person designated to decide the disputes arising under a contract is an employee of one of the parties to the contract does not entitle his decisions to any less finality than that accorded decisions of designated agents not so employed. *United States* v. *Moorman,* 338 U. S. 457, 461; *Goltra* v. *Weeks,* 271 U. S. 536, 548. See, also, *Kihlberg* v. *United States,* 97 U. S. 398; *Sweeney* v. *United States,* 109 U. S. 618; *United States* v. *Gleason,* 175 U. S. 588; *Ripley* v. *United States,* 223 U. S. 695; *Plumley* v. *United States,* 226 U. S. 545; *Merrill-Ruckgaber Co.* v. *United States,* 241 U. S. 387; *United States* v. *McShain, Inc.,* 308 U. S. 512, 520; cf. *United States* v. *Mason & Hanger Co.,* 260 U. S. 323, 326; *Burchell* v. *Marsh,* 17 How. 344; *Knox* v. *Symmonds,* 1 Ves. Ch. Rep. 369. No such differentiation is made where the Government is not a party to the contract. See *Martinsburg & Potomac RR. Co.* v. *March,* 114 U. S. 549; *Chicago & Santa Fe Railroad* v. *Price,* 138 U. S. 185; *Mundy* v. *Louisville & N. R. Co.,* 67 Fed. 633, 644 (C. A.

6); *Ranger* v. *Great Western Railway Co.*, 5 HL Cas. 72.

A presumption of honesty attaches to the selected arbiter (*United States* v. *Gleason, supra,* p. 607; *Elliott* v. *M. K. & T. R. R. Co.,* 74 Fed. 707, 712 (C. A. 8)), not a presumption of bias. Indeed there is an even greater basis for presuming impartiality and good faith when a government official is the arbiter. *Ogden* v. *United States,* 60 Fed. 725, 726–727 (C. A. 5). For, unlike the arbiters under private contracts, the designated agents "are also public officials who, as such, are presumably worthy of trust, and they have no financial interest in the questions which may arise under the contract which interest would cause them not to be impartial." *Bein* v. *United States,* 101 C. Cls. 144, 168 (Madden, J. concurring).

Moreover, the court below erroneously assumes throughout its opinion that the decision of the contracting officer controls. Article 15, however, clearly provides for an appeal from the contracting officer's decisions to the head of the department, and it is to the latter's decisions that the contract accords finality. The head of the department, in contrast to the contracting officer, is not immediately concerned with the day by day performance of the contract and is in a position to take a more objective view of the merits of the dispute. It is for this very reason

that Article 15 requires an appeal to the department head and this Court has held that it is a method well calculated to correct arbitrary and erroneous rulings and decisions of subordinate officials. *United States* v. *Blair,* 321 U. S. 730, 734–737; *United States* v. *Holpuch,* 328 U. S. 234, 239–240. Yet the court below, without any discussion and without any finding other than the conclusory one that his decision was arbitrary and so grossly erroneous as to imply bad faith, has set aside and disregarded the decision of the department head here involved.[5]

We submit that the presumption, indulged in by the court below, to the effect that governmental agents are presumably prejudiced in favor of the Government when they are cast in the role of the arbiters, and that that presumption is to be accorded weight in evaluating their good faith when their decision is subjected to judicial review, has no basis in law or in fact and should be rejected.

B. THE FACT THAT THE FINDING OF THE DESIGNATED OFFICER IS INCORRECT DOES NOT, WITHOUT MORE, INVALIDATE HIS RULING

Under the formula adopted by the court below there must be weighed, secondly, "the correctness

[5] In *United States* v. *Blair,* 321 U. S. 730, 736, the Court remarked that we "cannot on this record attribute to the departmental head the alleged unreasonable attitude of his subordinates." The record here affords even less grounds for so doing.

of his [the contracting officer's] findings." We submit that that factor is entitled to no weight as such. The presence of mere error in the designated agent's decision is irrelevant in determining whether to accord it finality. Were the decision to be final only if correct, there would be little purpose in including the finality provision in the contract, for then it would not operate to reduce the volume of potential litigation which would result from such disputes.[6] As this Court has long recognized, it is plainly contemplated by the finality provision that the designated agent would make erroneous rulings but that mere error would not be sufficient to warrant denying finality thereto. "* * * it was expressly stipulated that the [designated agents'] determination should be final and conclusive. Neither party reserves the right to revise that determination for mere errors or mistakes upon his part." *Martinsburg & Potomac RR. Co.* v. *March*, 114 U. S. 549, 554; *Chicago & Santa Fe Railroad* v. *Price*, 138 U. S. 185, 193; *Ripley* v. *United States*,

[6] Such a course would effectively destroy the value of a "finality" provision in a contract. As this Court has said, "the contract did not contemplate that the opinion of the court should be substituted for that of the engineer." *Ripley* v. *United States*, 223 U. S. 695, 704. Arbitrators should not be treated "as guilty of corrupt partiality, merely because their award is not such an one as the chancellor would have given. We are all too prone, perhaps, to impute either weakness of intellect or corrupt motives to those who differ with us in opinion." *Burchell* v. *Marsh*, 17 How. 344, 350. See also *Ogden* v. *United States*, 60 Fed. 725, 727 (C. A. 5).

223 U. S. 695, 704; *Burchell* v. *Marsh*, 17 How. 344, 349–350; *Knox* v. *Symmonds*, 1 Ves. Ch. Rep. 369.

We do not contend, of course, that there can never be an error so gross, or a ruling so arbitrary, as to support an ultimate finding of bad faith. But it is significant that so far as we have been able to discover, this Court has never set aside the findings of a contracting officer on the sole ground that his mistake was so gross as necessarily to imply bad faith.[7] It is obvious from the language repeatedly emphasized by this Court (see cases cited *supra*, pp. 16–17), that the mistake must have been so outrageous and the proof thereof so irrefutable and overwhelming that no reasonable person could reach any conclusion other than that the contracting officer acted in bad faith. See *Choctaw & M. RR. Co.* v. *Newton*, 140 Fed. 225, 234 (C. A. 8), certiorari denied, 202 U. S. 620. The phrase "such gross mistake as *necessarily* implied bad faith"[8] can only mean that the error must be so gross as to compel an inference of bad faith and must be the equivalent of the bad faith which might be proved by more direct evidence. But the record in this case does not even permit such an inference, let alone compel it. See *infra*, pp. 24–33.

[7] See note 4, *supra*, p. 17.

[8] *United States* v. *Moorman*, 338 U. S. 457, 461 (italics supplied).

of his [the contracting officer's] findings." We submit that that factor is entitled to no weight as such. The presence of mere error in the designated agent's decision is irrelevant in determining whether to accord it finality. Were the decision to be final only if correct, there would be little purpose in including the finality provision in the contract, for then it would not operate to reduce the volume of potential litigation which would result from such disputes.[6] As this Court has long recognized, it is plainly contemplated by the finality provision that the designated agent would make erroneous rulings but that mere error would not be sufficient to warrant denying finality thereto. "* * * it was expressly stipulated that the [designated agents'] determination should be final and conclusive. Neither party reserves the right to revise that determination for mere errors or mistakes upon his part." *Martinsburg & Potomac RR. Co.* v. *March,* 114 U. S. 549, 554; *Chicago & Santa Fe Railroad* v. *Price,* 138 U. S. 185, 193; *Ripley* v. *United States,*

[6] Such a course would effectively destroy the value of a "finality" provision in a contract. As this Court has said, "the contract did not contemplate that the opinion of the court should be substituted for that of the engineer." *Ripley* v. *United States*, 223 U. S. 695, 704. Arbitrators should not be treated "as guilty of corrupt partiality, merely because their award is not such an one as the chancellor would have given. We are all too prone, perhaps, to impute either weakness of intellect or corrupt motives to those who differ with us in opinion." *Burchell* v. *Marsh*, 17 How. 344, 350. See also *Ogden* v. *United States*, 60 Fed. 725, 727 (C. A. 5).

223 U. S. 695, 704; *Burchell* v. *Marsh,* 17 How. 344, 349–350; *Knox* v. *Symmonds,* 1 Ves. Ch. Rep. 369.

We do not contend, of course, that there can never be an error so gross, or a ruling so arbitrary, as to support an ultimate finding of bad faith. But it is significant that so far as we have been able to discover, this Court has never set aside the findings of a contracting officer on the sole ground that his mistake was so gross as necessarily to imply bad faith.[7] It is obvious from the language repeatedly emphasized by this Court (see cases cited *supra,* pp. 16–17), that the mistake must have been so outrageous and the proof thereof so irrefutable and overwhelming that no reasonable person could reach any conclusion other than that the contracting officer acted in bad faith. See *Choctaw & M. RR. Co.* v. *Newton,* 140 Fed. 225, 234 (C. A. 8), certiorari denied, 202 U. S. 620. The phrase "such gross mistake as *necessarily* implied bad faith"[8] can only mean that the error must be so gross as to compel an inference of bad faith and must be the equivalent of the bad faith which might be proved by more direct evidence. But the record in this case does not even permit such an inference, let alone compel it. See *infra,* pp. 24–33.

---

[7] See note 4, *supra,* p. 17.

[8] *United States* v. *Moorman,* 338 U. S. 457, 461 (italics supplied).

II

THE COURT OF CLAIMS' CONCLUSION OF BAD FAITH ON THE PART OF THE GOVERNMENT ARBITERS CANNOT STAND SINCE THAT COURT MADE NO FINDINGS AS TO WHAT EVIDENCE WAS BEFORE THE OFFICIALS AT THE TIME OF THE ADMINISTRATIVE DETERMINATION.

The Court of Claims made no finding as to what evidence the contracting officer had before him at the time he made his determination. Nor is there any finding as to the record which was before the head of the department at the time he affirmed the decision of the contracting officer.[9] We submit that the failure of the court below to

[9] This highlights the need of alleging and proving "fraud, or such gross mistake as necessarily implied bad faith" so often stressed by this Court. *United States* v. *Gleason*, 175 U. S. 588, 607–608; cf. *Merrill-Ruckgaber Co.* v. *United States*, 241 U. S. 387, 393. Such an element was a necessary part of respondent's case. See *Martinsburg & Potomac R. R. Co.* v. *March*, 114 U. S. 549, 553; *United States* v. *Mason & Hanger Co.*, 260 U. S. 323, 326; *City of Lexington* v. *Pratt*, 31 F. 2d 820, 821 (C. A. 4); *Breyman* v. *Ann Arbor R. Co.*, 85 Fed. 579, 586 (C. C. N. D. Ohio). Respondent, in its brief in opposition (p. 1), contends that the allegations of its petition in the Court of Claims raised this issue, that the case was tried on this issue in the court below and that the head of the department considered the appeal on this theory. But allegations that the United States breached the contract "in that it arbitrarily, unlawfully * * * required the claimant to perform and furnish labor and materials not called for by said contract * * *; arbitrarily and unreasonably classified various items of work erroneously * * *; deliberately underpaid claimant," etc. (R. 1–2), are nothing more than a general allegation of wrongful breach of contract. They are no substitute for an allegation that the

make these essential evidentiary findings completely invalidates its ultimate finding of arbitrariness and bad faith.

It is obvious that a finding of "gross error", which error "necessarily" gives rise to the inference of bad faith on the part of the designated agent, must be predicated upon an appraisal of the evidence which the agent had before him at the time he acted. That evidence may be either more, less, or completely different from that which is before the court. A man cannot act in bad faith by failing to accord weight to evidence which he has neither seen nor heard; likewise the reviewing court is not in a position to conclude that the agent's decision was so grossly erroneous as necessarily to imply bad faith if the evidence upon which the agent based his decision is unknown to the court. Here the court below failed to make any finding whatsoever as to the evidence before the designated agent. In so doing, it ignored the decision of this Court in *Ripley* v. *United States,* 220 U. S. 491. There, although the Court of Claims had found that the Government's designated agent had improperly refused to allow the imposing

---

government officers made their decision fraudulently or in bad faith, or that they made an error so gross as to imply bad faith. The original findings and opinion of the Court of Claims rather clearly show that the case was neither tried nor decided on the theory of fraud or gross mistake (R. 23–24).

of crest rocks on a jetty at a time when "it was manifest" that the conditions for performing that work were satisfied, this Court returned the record to the Court of Claims "to explicitly find whether or not that which [the court] states was manifest was or was not known to the inspector." 220 U. S. at 496. See, also, *Ripley* v. *United States,* 222 U. S. 144, 147–148; *Burchell* v. *Marsh,* 17 How. 344, 349–350. Similarly, had the court below here tested the designated agent's rulings against the matters known to him, the court might well have concluded that his rulings were not so grossly erroneous as to warrant implying bad faith, notwithstanding the fact that these rulings might have seemed so in the light of the more elaborate and possibly different evidence before the court.

III

THE FINDINGS OF THE COURT FAIL TO ESTABLISH ERROR SO GROSS AS NECESSARILY TO IMPLY BAD FAITH IN RESPECT OF THE CLAIMS WHICH THAT COURT ALLOWED.

The special findings of fact of the court below are inadequate to establish gross mistake or error on the part of the contracting officer or the head of the department. As we have shown above, the court below failed to find what evidence was before the arbiters. It may well be that on the basis of the evidence before them their findings were correct and thus there was no error, much less gross error. But even assuming that the evi-

dence before the arbiters and the court below was identical, the findings below do not sustain the judgment.

A. THERE WAS NO BAD FAITH WITH RESPECT TO THE RULINGS ON THREE ITEMS SPECIFICALLY HELD TO BE GROSSLY ERRONEOUS

In its opinion, the court below found the decisions of the contract arbiters to be incorrect with respect to eight items and specifically discussed them. As to three main items, the court concluded that the contracting officer "did not act as an impartial, unbiased arbiter and that his decisions, therefore, must be held to have been * * * lacking in that good faith required of an unbiased, impartial arbiter" (R. 30). But the facts before the court in respect of these three items were not "sufficient to overcome the presumptions of honesty, trustworthiness, and faithful discharge of duty which surround the report of the chosen arbiter of the disputes of these parties" (*Elliott* v. *Missouri, K. & T. R. R. Co.*, 74 Fed. 707, 715 (C. A. 8)), or to establish "such gross mistake as would necessarily imply bad faith, or a failure to exercise an honest judgment". *Kihlberg* v. *United States*, 97 U. S. 398, 402.

Thus, in respect of the conduit under 12th Street and Ford Avenue, the respondent had submitted a price of $32.00 per lineal foot, had later agreed to accept $6.00 and was ultimately paid $4.00 by the United States (Fndg. 10, R. 18–19).

The court below fixed a price of $8.00 (R. 19, 30). When, as here, the respondent had freely agreed to accept from the Government an amount 50% closer to the sum finally tendered by the Government than the amount awarded by the Court of Claims, we submit that it cannot successfully be contended that the proof of error is so "overwhelming, or persuasive beyond a reasonable doubt, or free from all doubt and convincing, or so outrageous" as to justify setting aside the decision of the contracting officer and the Secretary of Commerce. *Choctaw & M. R. R. Co.* v. *Newton,* 140 Fed. 225, 234 (C. A. 8), certiorari denied, 202 U. S. 620.

Nor do the facts in respect to the claim concerning the excavation of trenches measuring more than 6" x 18" (Fndg. 6, R. 17), and the claim concerning the furnishing and installing of wooden poles (Fndg. 12, R. 19–20) furnish the basis for imputing bad faith to the contracting officer. While, in respect to the excavation, a great disproportion appeared between the amount excavated and the amount paid for, that fact, without more, is insufficient basis for an inference of bad faith. And though the court's opinion states that "the defendant does not undertake to explain how the contracting officer, in making his computation, could have made so gross an error * * *" (R. 29), that is not the fact, as the Government's request for special findings, a

copy of which has been filed with the Clerk of this Court, demonstrates.[10] Similarly, the court's conclusion as to the wood poles, considered in the light of the Government's argument with respect

[10] With respect to the excavation of trenches here in question, the Government had this to say (pp. 69–70): "Cable Trench in Excess of 6″ x 18″ Contract Item 3.141(d) (Finding 6)

"Plaintiff claimed underpayment on the item of trench excavation in excess of 6″ x 18″. This trenching apparently arose from certain hand trenching that had to be done in the areas underlaid with cables, and in searching for ducts under taxiways. Plaintiff has apparently claimed also the 'excess' dug by the larger trenching machine over a regular 6″ x 18″ trench. As noted above the use of this machine was by the choice of the contractor. The proof fails to establish underpayment, although the Commissioner finds underpayment for 426 cubic yards.

"Spec. 405–3, addendum No. 1 (Pltf. Ex. 1) states that excess trenching will be considered only when the number of cables installed in that trench exceed two and are spaced at 3″ intervals. There was no showing under this item of cables laid in excess of two.

"Stamberger (Tr. 384) and Penner (Tr. 61) note the presence on the job of the larger trenching machines on which part of this item of claim is based.

"Plaintiff's whole claim on this item is based on an unidentified and unexplained Exhibit 8. Very little interpretation of this exhibit could be made by defendant's witness (Tr. 385ff). Plaintiff never explained this exhibit, but speculation by defendant's witness is the most the Court has before it. Opposed to this is Deft. Ex. 8, pp. 56–57, which shows, for example, that final payment (Deft. Ex. 9) included 262′ of excavation in front of hangar and office. Plaintiff seems to be claiming for this (Stamberger, Tr. 386). Further inaccuracies are indeterminate. Clearly the proof fails to support the claim."

to them [11] is hardly a basis from which bad faith must necessarily be inferred.

[11] The Government's request for special findings had this to say with respect to the wood poles (pp. 74–75); "Furnishing and Installing Wood Poles Contract Item 3.12(o) (Finding 12)

"Plaintiff furnished and installed the following size wood poles on the job: 1–18′, 2–20′, 6–25′, 3–30′ (Stamberger, Tr. 556). The contractor was compensated for this work at $35.00 per pole.

"The contract contemplated the installation of an unspecified number of poles of 35′ and more in height. For the minimum height of 35′, the contractor bid $35.00 per pole.

"After the work was begun, CAA ordered the installation of the shorter poles and included the work in its Equalization Order 532 at $35.00 per pole, irrespective of height (items 3.12(o), 1–4 incl.). Plaintiff was paid this amount, which the proof does not show was unreasonable. Defendant has taken exception to the Commissioner's Finding of $70.00 per pole as a reasonable figure.

"Again, the Court is faced with the same problem as was CAA. That agency repeatedly asked the contractor for justification of his figures on this work, and only after protracted correspondence and conferences, it decided justly on the figure of $35.00 per pole irrespective of height, although all poles were less in height than the 35′ pole the contractor bid upon at $35.00 (DuLude Tr. 481).

"The contractor has shown no cost records to substantiate his claim, but says the figures in the petition represent the 'fair and reasonable value' of the work. But the Government's representative Stamberger, from his diary proved the exaggerated character of this claim (Stamberger, Tr. 551–561). Thus for example, Penner said he could never set more than four poles in a day (Penner, Tr. 119) but the diary entry of Stamberger shows 12 poles were set in one day, November 21 (Stamberger, Tr. 555–557).

"While the contractor made much of the snow and ground frozen a foot deep (Penner, Tr., 100) Stamberger's diary revealed no such conditions, although there were intermittent showers (Stamberger, Tr. 393)."

The court below may properly have found error; but the Government insists that the existence of such error did not warrant, much less compel an inference of bad faith.

We have, up to this point in this section of the argument, been discussing the criticisms made by the Court of Claims of the administrative rulings as if they were embodied in the court's findings. But that is not the case. The special findings state only that the arbiters were government employees and that their decisions, in some respects, were wrong. They contain no intimation that the actions of the contracting officer and of the Secretary of Commerce were arbitrary or so grossly erroneous as to imply bad faith. The additional finding, made on the motion for a new trial, that the arbiters' decisions were arbitrary and so grossly erroneous as to imply bad faith adds nothing. It was an ultimate finding, and, as such, it is fatally defective because it is not supported by evidentiary findings and does not "include circumstantial facts sufficient to warrant the court's conclusion in respect of the main issues." *United States* v. *Esnault-Pelterie,* 299 U. S. 201, 205–206. There is no subsidiary finding anywhere on which may be rested the ultimate finding of arbitrariness.

B. THE COURT BELOW ERRED IN ATTRIBUTING THE BAD FAITH IT INFERRED FROM THE ADMINISTRATIVE RULING ON THE PRECEDING THREE ITEMS TO THE RULINGS ON FIVE OTHER ITEMS

The court below committed plain error when it spread the bad faith which it inferred from rulings on three items over into five other items. With respect to these five items, the court below admitted, in its opinion, that they were small in amount and "give no indication of arbitrary action on the part of the contracting officer" (R. 30). The court referred to its finding of implied fraud with respect to the three items already mentioned, however, and stated that "we are convinced that the biased attitude which was evident in the circumstances which we have cited affected his decision upon all the items of the claim (R. 31).

Apart from the fact that there is nothing in the court's findings to support this statement in the opinion (*United States* v. *Callahan-Walker Co.*, 317 U. S. 56, 59; *United States* v. *Esnault-Pelterie*, 299 U. S. 201, 205–206; 303 U. S. 26, 28–29; *United States* v. *Causby*, 328 U. S. 256, 267–268), the court's refusal to accept the designated agent's rulings on the three items is, as we have already noted, based not on actual bias, but an imputation of bias or bad faith derived from the errors in regard thereto which it found he had committed. Assuming that the errors in the three items were so gross as to warrant an imputation of bad faith, it does not follow that such

implied bad faith permeated the five claims as to which no such gross error was found. On the contrary, the designated agent, far from rejecting all, allowed some of respondent's claims (cf. *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 337 U. S. 656), and the court below recognized the propriety of these rejections by itself denying recovery on the bulk of the claims asserted. By entering judgment for respondent for only about $3,500 in the face of respondent's claim for about $20,000, the court below made it manifest that it did not itself believe that the designated agents' "bias" tainted all their actions on respondent's claims.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the judgment below is erroneous and should be reversed.

PHILIP B. PERLMAN,
Solicitor General.

NEWELL A. CLAPP,
Acting Assistant Attorney General.

PAUL A. SWEENEY,
RICHARD P. WILLIAMS III,
Attorneys.

NOVEMBER, 1950.

U. S. GOVERNMENT PRINTING OFFICE: 1950